84-728

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NO. 84-728

IN THE
SUPREME COURT OF THE UNITED STATES

1984 Term

PHILIP D. ALDOUS
Petitioner,

v.

CATHERINE B. ALDOUS
Repondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

I. Does the consideration in a custody proceeding of the religiously-based activities of a parent as one factor among many in the evaluation of the best interests of a child violate the religious clauses of the First Amendment as applied through the Fourteenth Amendment?

II. Does the consideration of such religiously-based activities in a custody proceeding constitute a *per se* violation which requires reversal?

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ARGUMENT

Contrary to the contentions of the Petitioner, this case does not involve a situation in which a court has made a child custody determination because of an unfavorable opinion of a parent's religious beliefs. As this brief will indicate, the decision of the lower court to award custody to the Respondent was based on many different factors. One such factor was the effect the Petitioner's religiously-based lifestyle would have on the children's lives.

The consideration of the effect of religiously-based activities, as distinct from beliefs, on a child's welfare in a custody proceeding is a narrow, but proper, topic of inquiry. While the objective validity of the religious beliefs or their temporal merits is not a valid basis for a court's consideration in any context, e.g., Thomas v. Review Board of Indiana Employment Security

Division, 450 U.S. 707 (1981) (resolution of question of what is or is not a religious belief does not turn on judicial perception of particular belief or practice in question); Gillette v. United States, 401 U.S. 437 (1971) (validity of putative conscientious objector's beliefs not a proper subject for judicial scrutiny), the effect of those beliefs when put into action may be properly addressed by the courts. Thus, in Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944), it was stated that the authority of the state to act as parens patriae is "not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." The delineation between belief and action in a religious context is perhaps most vividly illustrated by those cases in which parents attempt to deny

medical treatment to their critically ill children, such as when Jehovah's Witnesses object to transfusions of blood. See, e.g., Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964); Jehovah's Witnesses of the State of Washington v. King's County Hospital, Inc., 278 F. Supp. 488 (W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968). The legitimacy of the religious beliefs was scrupulously avoided in those cases, but the effect of the activity on the welfare of the children involved was considered without hesitancy and the parents' religiously-based conduct was curtailed by the courts.

The issue in this case is not the validity or propriety of religious beliefs, but whether the effect of those beliefs on the

welfare of the children may be considered as one factor in a custody determination. This issue is not of recent origin; courts have been considering the question since at least In re Doyle, 16 Mo. App. 159 (1884), where it was held that a court in a child custody proceeding cannot pass on the comparative merits of various religions. Since that time, courts have generally held that, while religion may not be the sole factor for resolving a custody dispute, "the religious factors involved in an award are a proper matter to be considered by the court in determining what decision is best for the general welfare of the child . . . ." Annot., "Religion As Factor In Child Custody and Visitation Cases," 22 A.L.R.4th 971, 976 (1983). The general rule which has emerged is that where a prospective parental custodian's "religious

convictions might result in physical or mental harm," or where the child is of "an age to have developed a substantial interest in and feeling for a particular religion," the courts will take such into consideration. Id. at 976, 987. This is substantially the same rule applied by the lower court in this case. Aldous v. Aldous, 99 A.D.2d 197, 473 N.Y.S.2d 60, 62 (1984) (court may consider religious factors where child developed actual ties to specific religion, where belief poses threat to child's well-being or violates law). The per se rule apparently advocated by the Petitioner, however, would have such considerations for a child's welfare nullifed on the basis of a putative claim of religious liberty.

I. THERE IS NO DISPUTE AMONG THE STATES WHICH REQUIRES RESOLUTION.

The Petitioner's assertion that the states "differ markedly" in the manner in

which religious factors may be considered in custody proceedings is without merit. It is true that religious beliefs alone afford no grounds for the denial of custody, and no court has so held. See generally Annot., supra, 22 A.L.R.4th 971 (1983). Nor has any court ruled that religious activities may never be considered when evaluating the best interests of the child. Rather, in cases which have had a religious factor injected into the proceedings, the question has been how and whether the activities will affect the general welfare of the child; where custody has been denied on that basis, it has been because the practices "were found to seriously threaten the health or physical well-being of the child, or lead such parent to neglect it . . ." Id. at 997. Furthermore, in none of the cases cited by the

Petitioner were religions "judicially evaluated;" rather, the religiously-based activities were considered for their impact on the welfare of the child. This sort of judicial scrutiny of activity has been approved in other contexts by this Court. See United States v. O'Brien, 391 U.S. 367 (1968) (activity component of otherwise protected first amendment activity (speech) may be regulated).

The allegation that the state courts are "widely divergent" is without support; in fact, the cases relied on by the Petitioner for this proposition prove the opposite. In Osier v. Osier, 410 A.2d 1027 (Me. 1980), cited as a case in which inquiry into a parent's religious activities is "severely restricted," the court held that the standard of the best interests of the child was

controlling, and that dangers posed to the child as a result of certain religious practices can be considered in a custody dispute. The trial court was reversed in that case not because it had considered religious activities in making its decision, but rather because there was insufficient evidence of danger to the child to support the trial judge's conclusion. Similarly, in Jackson v. Jackson, 181 Kan. 1, 309 P.2d 705 (1957), the court did not reject the use of religion as a factor in child custody cases, but found impermissible the use of religion qua religion as the primary factor of the custody decision. This approach is consonant with the general rule that religion may not constitute the only or primary reason in support of a custody decree. This theme was echoed by Felton v. Felton, 383 Mass. 232,

418 N.E.2d 606 (1981), and Sanborn v. Sanborn, 465 A.2d 888 (N.H. 1983), both of which involved visitation rights rather than custody disputes. Even in this context, both courts stressed that the best interests of the child prevailed, and that the court should be able to address the issue of the parties' religion as they relate to the "concerns and temporal welfare" of the children. 465 A.2d at 893. The balance of the cases relied on by the Petitioner reach similar conclusions, and all are in accord with the decision reached in this case. Religious activities as a factor may be inquired into for the impact they may have on the child's welfare, but may not constitute the sole basis for a decision.

The cases cited by the Petitioner as opposing and divergent to this standard are,

upon scrutiny, actually supportive. Burnham v. Burnham, 208 Neb. 498, 304 N.W.2d 58 (1981), for example, held that the child's best interest governed and that religion may be one, but not the only, factor in a custody determination. In re Marriage of Moorehead, 224 N.W.2d 242 (Iowa 1974) held similarly. The consonance of the case law among the several states is aptly demonstrated by Morris v. Morris, 271 Pa. Super. 19, 412 A.2d 139 (1979). Morris reached the familiar conclusion that religious activities may be considered, and quoted approvingly at length from Munoz v. Munoz, 79 Wash. 2d 810, 489 P.2d 1133 (1971). It is significant that the Petitioner cited Morris and Munoz as "markedly" different from each other, despite the fact that they both reached similar conclusions. There is therefore no

divergence among the states regarding the propriety of considering religious activities as they may affect the best interests of the child in a custody dispute.

II. NO CONSTITUTIONAL PROVISION IS VIOLATED ON THESE FACTS.

A) The Consideration Of Religiously-Oriented Activities Does Not Constitute An Establishment of Religion

When legislation or official conduct is challenged as violative of the Establishment Clause, it is well established that the activity should be "scrutinized . . . to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." Lynch v. Donnelly, 104 S. Ct. 1355, 1361 (1984) (citing Walz v. Tax Commission, 397 U.S. 664, 669 (1970)). In this regard, no rigid or mechanical rules of analysis can

properly be delineated; the clause is not a "statute," but an "objective," erecting a "'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" 104 S. Ct. at 1362 (quoting Walz v. Tax Commission, supra, 397 U.S. at 668, and Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)). Inquiry into whether the challenged activity has a secular purpose, whether its principal effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion has nevertheless proven to be "often useful." 104 S. Ct. at 1362. See also Lemon v. Kurtzman, supra (test used to invalidate direct state aid to parochial schools because, inter alia, statutory scheme required excessive entanglement and likely to foster political divisiveness).

The line or barrier between the government and the erection of "any national ecclesiastical establishment" is in no way breached in this case. Lynch v. Donnelly, supra, 104 S. Ct. at 1361 (quoting 3 Story, Commentaries on the Constitution of the United States 728 (1833)). In a child custody matter, the purpose behind any consideration of religious-based activities of a parent is secular in nature. The focus is on the best interests of the particular children given their particular circumstances, not on the favoring of any particular religious belief over others. Further, no aid, direct or indirect, is accorded any church or religion as a consequence of a custody determination. No church or religion is hindered in its activities. Finally, there is no evidence of an excessive entanglement of govern-

ment with religion on these facts.

In the context of determining custody of children of divorce, some inquiry regarding the religious activities of parents and children when gathering evidence concerning their overall activities may in fact be inevitable. As this Court itself has stated: "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). It has been recognized that religious and other activities will at times overlap, and therefore "a hermetic separation of the two is an impossibility [the Establishment Clause] has never required." Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 746 (1976).

The Petitioner's claim that mere consideration of religious actitivies in the context of evaluating the best interests of a

child in a custody proceeding constitutes a violation of the Establishment Clause is without merit; it cannot fairly be said that, in reality, such considerations work to establish a religion or religious faith. Cf. Lynch v. Donnelly, supra. No real issue of establishment is raised by these facts. The narrow focus taken on this one aspect of the custody proceeding has resulted in an analytical error by the Petitioner: To "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." Lynch v. Donnelly, supra, 104 S. Ct. at 1362. This is the result reached by the Petitioner. In actuality, this case does not present any genuine religious issue or objective which requires the sanction or protection of the Establishment Clause.

B) The Consideration Of Religiously-Oriented Activities Does Not Burden The Free Exercise Of Religion

The Petitioner's right to the free exercise of his religion is not drawn into question through the award of custody of the children to the Respondent. The Free Exercise Clause acts as a "prohibition against governmental regulation of religious beliefs, [and] protection for lawful conduct grounded in religious belief . . ." Bob Jones University v. United States, 103 S. Ct. 2017, 2034-35 (1983) (citing Thomas v. Review Board of Indiana Employment Security Division, supra; Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)). Sincerely held religious beliefs or practices therefore may not be directly or indirectly

burdened by government action, unless the challenged action serves a compelling interest that cannot be achieved in a less restrictive manner. Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. at 718; L. Tribe, American Constitutional Law § 14-10 (1978). The burden of proof in free exercise cases is on the plaintiff to demonstrate a burden on religious practice, School District of Abington v. Schemp, 374 U.S. 203, 223 (1963), and inasmuch as the Petitioner has not met that requirement, there is no violation of the clause.

The Free Exercise Clause is violated where "substantial pressure [is placed] on an adherent to modify his behavior and to violate his beliefs . . . ." Thomas v. Review Board of Indiana Employment Security

Division, supra, 450 U.S. at 718 (1981). On these facts, there is no violation because neither the right to custody nor visitation was conditioned upon the Petitioner altering his beliefs. Nor is the Petitioner required to compel affirmation of a repugnant belief, as in Torasco v. Watkins, 367 U.S. 488 (1961) (oath of office), nor is a penalty exacted against him because his religious views are "abhorrent" to the authorities, as in Fowler v. Rhode Island, 345 U.S. 67 (1953). He is freely able to engage in his religious activities of choice, and his absolute right of belief remains unaffected. The Petitioner has therefore not alleged a cognizable burden.

Even assuming arguendo that some burden is placed on the right of free exercise, it has not been demonstrated to be substantial;

a custody decision in which liberal visitation rights are provided for is considerably less onerous for free exercise purposes than the forced participation of Amish children in secular schooling attempted by the state in Wisconsin v. Yoder, supra. Even in that context, Chief Justice Burger cautioned that "the very concept of ordered liberty precludes allowing every person to make his own standards" regarding the conduct of themselves or their children. 406 U.S. at 215-26. Parental rights to freely practice religion are therefore not affected by state actions taken to protect and preserve the health and welfare of their children, even when the actions taken are contrary to the religious beliefs of the parents. It is not the beliefs which are at issue, but the actions taken pursuant to those beliefs which

may be acted upon by the state. See, e.g., Prince v. Massachusetts, supra (child labor prohibitions upheld against claim of free exercise for child's religious pamphleteering); Application of President & Directors of Georgetown College, Inc., supra (medical treatment); Harley v. Oliver, 404 F. Supp. 450 (W.D. Ark. 1975), aff'd, 539 F.2d 1143 (8th Cir. 1976) (same); Jehovah's Witnesses of the State of Washington v. King's County Hospital, Inc., supra (same). In this case, no religious conduct is being prohibited or limited. The Free Exercise Clause is not involved on these facts.

III. THE MATTER WAS PROPERLY RESOLVED BY THE COURT BELOW.

The Petitioner has alleged that his religious beliefs were used against him in the determination of custody following his

divorce from the Respondent. Scrutiny of the trial record, the judge's findings, and the appellate decision reveals, however, that insofar as the issue of religion was involved, it was considered only to the extent of the activities and the resultant effect on the children. The findings of the trial judge reveal that the custody determination was based on many factors in addition to that of religion, including the fitness of the Respondent, the Respondent's stable family life, the fact that the children and the Respondent have never been separated, and the downgrading of the Respondent by the Petitioner in front of the children. All these factors, when taken together with the lifestyle and religious activities of the Petitioner, formed the basis for the custody determination.

It is well established that the final determination by a trial court of a child custody dispute should not be disturbed on appeal, absent an abuse of discretion or manifest error. Martin v. Martin, 74 A.D.2d 419, 427 N.Y.S.2d 419 (1980); Arcarese v. Monachino, 58 A.D.2d 1030, 397 N.Y.S.2d 284 (1977); Opferbeck v. Opferbeck, 57 A.D.2d 1074, 395 N.Y.S.2d 831 (1977). The reason for this rule is the recognition that the trial court, having viewed all the evidence regarding the best interests of the children, is in the best position to weigh the importance of any particular factor regarding custody. In this case, the appellate court on review recognized that the trial court used a multiplicity of factors in making its custody determination. The appellate court stated that if the trial court rested its

decision on the "view that [Petitioner's] religious beliefs are too discipline oriented, [it would be] constitutionally proscribed as a basis for awarding custody." Aldous v. Aldous, supra, 473 N.Y.S.2d at 62. In view of the totality of the evidence, however, it is clear that the consideration of religious activities was not abused. Id. at 63. With regard to the religious activities issue, the appellate court affirmatively found that even if it were assumed that it was improper, the record "negate[d] any implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion . . . ." Id.

Insofar as the Petitioner's religious beliefs did not constitute the basis of the award, and in light of the evidence that to the extent that the conduct which would

result from those beliefs was considered did not taint the final determination, the issue was properly resolved by the court below and the custody award was made on no constitutionally proscribed basis.

CONCLUSION

For the foregoing reasons, the application for a writ of certiorari in this case should be denied.

Respectfully submitted,

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